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Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

Paulette Harris

Petitioners,

v.

Creative Hairdressers, Incorporated,
d/b/a Hair Cuttery
and
The Ratner Companies; Teresa Heid

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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July 20, 2006

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QUESTION PRESENTED FOR REVIEW

1) Did the Fourth Circuit err in concluding that Petitioner's right to contract was not "impeded, thwarted, or deterred" in violation of 42 U.S.C. § 1981 when Respondents' employees insisted that Petitioner, an African American, pay substantially more for hair services or leave, demanded pre-payment for services and forced her to wait for services while servicing another patron, all expressly on account of her race, even though Petitioner's own interventions prevented Respondents from succeeding and implementing the price differential and prepayment?

PARTIES TO THE PROCEEDING

Petitioner is Paulette Harris. She is Petitioner here and Appellant below.

The Appellees below and Respondents here are Creative Hairdressers, Incorporated d/b/a Hair Cuttery, The Ratner Companies and Teresa Heid.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Paulette Harris respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is set forth in the Appendix ("App.") at 1a-2a. The opinion and final judgement of the United States District Court for the District of Maryland is unreported and is set forth in the App. at 3a-15a.

JURISDICTION

The judgement of the Court of Appeals was entered on April 27, 2006. This Court has jurisdiction under 28 U.S.C. 1254.

STATUTORY PROVISIONS INVOLVED

Section 1981 of 42 U.S.C. in pertinent part provides:

(a) All persons within the jurisdiction of the United States shall

have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind and to no other."

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship

STATEMENT OF THE CASE

1. Petitioner, a black female, brought this action against Respondent, a beauty salon, claiming a violation of 42 U.S.C. § 1981 and claiming negligent hiring, training and supervision. Respondent's employees insisted that Petitioner pay substantially more for a hair cut or leave, demanded pre-payment for services and forced her to wait for service while

another patron was serviced, all expressly on account of her race.

The District Court granted summary judgment because it viewed Respondent's conduct as failing to rise to the level of "impeding, thwarting or deterring" Petitioner's right to contract, and Petitioner's own interventions, which prevented Respondent from succeeding and implementing the price differential and pre-payment, as negating an essential element of her 42 U.S.C. § 1981 claim.

Petitioner was an employee at Hair Cuttery located at Beltway Plaza from October 2001 to February 2002. During her employment with Respondent, she was never shown any videos "dealing with treating African American customers fairly". From her experience there was an adjustment to the basic charges for what is known as "ethnic charges".

While Petitioner worked for Respondent, she complained that Respondent's practices were unfair to African

American people. "I basically stated that I didn't think it was fair that African American people had to pay more money to have some of the services performed". For example, for straightening procedures, African Americans were charged more.

On March 11, 2004, Petitioner entered Respondent's salon between approximately 10:00 A.M. and 10:20 A.M. At that the time, there were 3 or 4 stylists. When she entered, Stephanie Pollard was highlighting her own hair and Theresa Heid was sweeping the floor. Respondent was approached by Ms. Heid who asked: "What are you having done today?". Petitioner responded: "shampoo, blow dry". Petitioner's name was subsequently entered into the computer. Stephanie Pollard came over and said: "Are you aware that it is $21.00 for a shampoo and blow dry for you? and I said 'no'. I said 'that's ridiculous, most of the time I pay $13.00, and she said 'it's because you are ethnic', and I said, 'is it because I have ethnic

hair', and she said 'no, you heard me, its because you are ethnic'. I said, 'I am not paying $21.00 for something that I normally pay $13.00 for' and she wrote down ..... she said, this is wrote down on the receipt that it was $21.00 and she said 'this is what you are going to pay or you can get out' (indicating). I said, 'No, I am going to call home office'." "The paper that Stephanie wrote ....., she wrote $21.00 on the paper, and then she wrote the 1-800 Trim Cut telephone number on the back of it. It is in her handwriting, clear as day. And she basically told me that this is what I was going to pay or I could get out. As if pay what I saw regardless of what the prices are, we are not going to service you and that's what I got from it."

When Petitioner asked why she was being charged $21.00 when normally she paid $13.00, Ms. Pollard replied: "It's because you are ethnic". "I said, "Is it because I have ethnic hair?", and she said no, you heard me, it's because you are ethnic".

After Petitioner replied: "you cannot deny me service and you cannot charge me extra because I am ethnic," Pollard shoved the paper toward Petitioner and went into the back shampoo area to rinse out the color in her hair. After Pollard's response, Petitioner called the home office and spoke to a lady named "Ruby" on her cell phone. She complained about what just transpired. Ruby asked Petitioner if she could have the opportunity to call the store and speak to Heid and Pollard. Petitioner agreed.

Immediately thereafter, the home office called and spoke to Theresa Heid. After the telephone call, Pollard further stated, "Make sure you let her know that she is going to have to pay up front because you people got a bad habit of getting services done and not paying for them before you leave." This was shouted across the salon floor and loud enough that Theresa Heid and "Kelly would have heard the statement." Petitioner, again, refused to be treated differently.

Theresa Heid asked Petitioner for the money up front. "Question: Did Theresa then ask you to pay?

Answer: Yes

Question: How did she say that to you?

Answer: She said you are going to have to pay up front." Petitioner refused.

Ms. Heid took another customer before Petitioner and made her wait. By the time all of this was over, Petitioner left at 11:40 A.M.

Petitioner felt so low about herself that she cried and her self-esteem was damaged. " You know she made me feel like, you know, as a black person that I didn't deserve to be serviced, you know, like in order to have this privilege to be serviced by them that I had to pay, you know, an extra amount, like being serviced by her was a privilege or something. It was just embarrassing. It was embarrassing for my baby to see her mom upset, to see me cry."

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DEPARTED FROM PRECEDENT REQUIRING THE LIBERAL CONSTRUAL OF 42 U.S.C. § 1981 TO ALLOW CLAIMS OF THIS TYPE TO PROCEED.

42 U. S. C. § 1981 evolved from the Civil Rights Act of April 9, 1866, C.31, 14 Stat. 27 and should be liberally construed. *U.S. Rhodes*, 27 Fed. Cas. 785 (No. 16, 151) (CC Ky. 1866); *Spieff v. C. Itoh & Co.,(America), Inc.*, 408 Fed. Supp. 916 (S.D. Tex. 1976). This sub-chapter guaranteeing equal rights under the law obligates commercial enterprises to extend the same treatment to all contractual customers as is enjoyed by white citizens. *Hall v. Pennsylvania State Potue,* 57 F.2d 86 (1978). In defining what is protected activity as defined by §1981, the Courts have held "these elements are flexible and are not to be applied rigidly". *Cohen v.*

Longmount United Hospital Association & 14 F. 3rd 516, 530 N.2 (10th Circuit 1994).

Under 42 U.S.C. §1981(a) Statement of Equal Rights, the provision provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind and to no other."

Under Section 1981 (b), make and enforce contracts is defined as "for purposes of this Section, the term make and enforce contracts includes the making, performance, modification and termination of contracts and the enjoyment of all benefits,

privileges, terms and conditions of the contractual relationship."

The Respondents posted a sign with the offer of $13 for a shampoo and blow dry. Petitioner accepted this offer and appeared at the Respondent's location to receive said service. Instead of preforming, Respondent revoked the offer and demanded $21 for a shampoo and dry. When questioned why the offer was withdrawn, it was expressly stated that the reason was race based. Petitioner contacted the Respondent's headquarters and through her own efforts was able to secure a contract at the advertised price, but the damage had already been done and Petitioner had been treated differently under the law. This effort on Petitioner's part did not preclude Respondent from making a second effort to treat Petitioner differently and unfairly by demanding Petitioner prepay for her services. Again, through her own efforts, Petitioner was able to secure a contract without the disparate requirement of having to prepay. Petitioner was unable to prevent the third effort to treat

her differently and unfairly and was forced to wait for service.

Petitioner's initial attempt to accept the contract offer as posted was impeded by the actions of Respondent. It is only through Petitioner's own efforts that the Respondent was not successful in enforcing an illegal contract. From the moment that Respondent placed additional requirements on Petitioner because of her race, her right to contract was impeded in violation of 42 U.S.C. § 1981.

II. THIS CASE PROVIDES A VEHICLE FOR DETERMINING WHETHER A CITIZEN'S OWN INTERVENTION PREVENTING DISCRIMINATORY FORMATION OF CONTRACT CAN NEGATE REQUIRED ELEMENTS OF A 42 U.S.C. 1981 VIOLATION.

In *Perry v. Command Performance,* 913 F.2d 1999 (3rd Circuit 1990), Perry's husband telephoned a hair salon and set up an appointment for his wife. Mrs. Perry was to receive a

wash and set from the Defendant, Command Performance. Mrs. Perry had her hair done at this salon more than five times before and from a number of different operators. Once at the hair salon, Mrs. Perry was to have her hair done by Helene Kugler. Ms. Kugler was not feeling well and had asked Mrs. Perry to allow Ms. Abbott to do her hair. When asked to do her hair, Ms. Abbott responded loudly, "No, no, no. I don't do black hair. No, no, no, no, not today". Ms. Abbott went on to exclaim, "I just don't do black people's hair!" "Oh no, I am not willing to do your hair. I am from New Hampshire and I don't deal with blacks." Id., 913 F. 2d at 100. Mrs. Perry claims to have been traumatized by the incident and left after a security guard contacted her husband who was in the mall.

Command Performance filed a Motion for Summary Judgment which the District Court Judge granted claiming that there is no violation of 42 U.S.C. § 1981 because the discriminatory conduct occurred subsequent to the formation of

the contract. The appellate court disagreed that as a matter of law there was a contract and opined that "Ms. Abbott's refusal to wash and set Mrs. Perry's hair could be viewed as a declination to enter into a contract for services with Mrs. Perry." Id., 913 F.2d at 102.

"In addition, even if the district court concludes that Ms. Perry entered a contract with Command Performance at the time the appointment was made, the court must give the parties an opportunity to present evidence as to whether that contract was grounded on discriminatory terms, i.e., to provide services only if a hairdresser were available who would be willing to wash and set a black patron's hair. Because it is possible to conclude from this record that a white person with an appointment to see Ms. Kugler would have been provided services by Ms. Abbott, or at least, would not have been denied services on the basis of her race, the contract itself may have been a violation of Section 1981." *Id.*, 913 F.2d at 102.

In *Wyatt v. Security in Food & Beverage, Inc.*, 819 F.2d 69 (4th Cir. 1987), at trial, the Plaintiff stated that Defendant employees approached each of them to inform them that the lounge had a policy of ejecting patrons who were not drinking. Each of the Plaintiffs protested but was nevertheless ejected. Each of the Plaintiffs testified that when he was ejected, he observed white patrons who were not drinking yet were allowed to remain. Each Plaintiff alleged that the lounge's "drink only" policy was discriminatorily applied to reduce the percentage of black patrons.

To substantiate the claim, Plaintiffs offered the testimony of a frequent lounge patron who testified that blacks were subjected to stricter requirements for admission and that only blacks were ejected for not drinking or other infractions of "lounge policy". *Id*, 918 F.2d at 70. The witness also testified that the lounge manager told her in 1984 that blacks were not wanted in the club. *Id.* In addition, Plaintiffs offered testimony

of past lounge employees who reported that various lounge practices were explicitly designed to discourage black patrons. *Id.*

Given the state of the record, the Appellate Court refused to overturn the District Court's denial of the Defendant's Motion for Judgment notwithstanding the verdict.

Patterson v. McLean Credit Union, 491 US 164, 109 S.Ct. 236, 105 L.Ed 2d 132 1989, held that Section 1981 "prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms". *Id* at 109, S.Ct. at 2372.

Respondent would only contract with the Petitioner upon discriminatory terms. Respondent would not require non-ethnic patrons to pay more for their hair cut. Price is a material term to a contract because it is a term which is essential to establishing "the nature and extent of the parties' obligation." *Kiley v. First Nat'l Bank of Md.*, 102 Md. App. 317, 333, 649

A. 2d 1145 (1994); *Goldstein v. Miles*, 159 Md. App. 403, 431, 859 A. 313 (2003).

Respondent would not require white patrons to pre-pay. Respondent would not pass over white patrons for service while ethnic patrons were being serviced. Respondent would not require non-ethnic patrons to bear the humiliation and embarrassment of such discriminatory conduct, particularly after Respondent's headquarters were called in an effort to rectify the situation. Respondent's employees persistence after the call is further evidence of discriminatory conduct actionable pursuant to § 1981, is so inflammatory, and a jury could conclude that such a high level of discrimination could only exist based upon corporate tolerance of discrimination against ethnic patrons.

It was improper for the Court of Appeals to conclude that the discriminatory conduct experienced by the Petitioner was incidental to and not significant enough to rise to the level

of a Sectin 1981 violation. Such a determination is the province of the jury. Further, the Court cannot bolster its own fact-finding simply because Petitioner had received the benefit of services from the same store on previous occasions. Such a history goes to the weight of Petitioner's credibility and not to any determination as a matter of law that a Section 1981 violation fails to exist.

In *Bobbitt v. Rage, Inc.*, 19 F. Supp 2nd, 512, 518-20, W.D.N.C. (1998), the Court held that an action can proceed where the Plaintiffs who were forced to prepay for food in a pizza restaurant demonstrated that the restaurant demonstrated that the restaurant altered a fundamental characteristic of the food service based on race. In *Bobbitt*, the Court held that the prepayment requirement was equivalent to "the Pizza Hut manager altered a fundamental characteristic of the service provided by the public accommodation solely on the basis of race". *Id,* 19 F. Supp 2nd at 520.

In *Washington v. Duty Free Shoppers, Ltd.*, 710 F.Supp 1288, 1289-90 (N.D. Cal 1988), the Court denied summary judgment to the Defendant where Plaintiff African Americans were customers told that they needed to show a passport and airline tickets before shopping for duty paid goods while other customers were not required to do so.

In *Eddy v. Waffle House, Inc.*, 335 F. Supp.2d 693, 2004 WL 2093244(D.S.C. 2004), the court held that the statement made by a waitress upon plaintiffs' entering the restaurant, that "we don't serve niggers in here", then the plaintiffs left was actionable under Section 1981.

a. Using a racial epithet,

b. Attempting to overcharge plaintiff based upon her being black,

c. Attempting to extract pre-payment because plaintiff was black or requiring her to leave the store, and

d. Passing plaintiff over for another customer, are all

conduct, isolated as well as combined, rising to the level as illegal under Section 1981. *Charity v. Denny's Inc.*, No. 98-0054, 1999 WL 544687, 1999 U.S. Dist. Lexis 11462:

> "Courts have recognized that the contract formed between a restaurant and a customer does include more than just the food ordered... This Court concludes that being admitted into a restaurant and ultimately being served does not preclude bringing a Section 1981 claim. Indeed, in light of the clear illegality of outright refusal to serve, a restaurant which wishes to discourage minority customers must resort to more subtle efforts to dissuade...efforts such as slow service, discourteous treatment, harassing comments and gestures and outright racial insults."

In *Baltimore-Clark v. Konko's Inc.*, 270 F. Supp. 2d 695, 699 (D. Md. 2003), the court held that a plaintiff must demonstrate that her right to contract has been "impeded,

thwarted, or deterred" **or special conditions were placed on a plaintiff's right to contract**. Baltimore-Clark cited *Buchanan v. Consolidated Stores, Corp.*, 125 F. Supp. 2d 730, 734 (D. Md. 2001), a case which expressly acknowledging that a requirement of prepayment is a special condition.

Petitioner is not knit picking, being overly sensitive, or grasping to stray remarks. Petitioner was victim of Respondent's attempt to require prepayment. Two-tier pricing is clearly illegal and clearly an example of imposing a special condition.

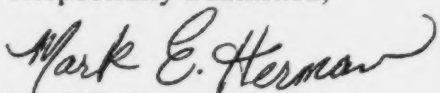
The amendment to Section 1981, which is subsection (b) was meant to fill the gap created by Supreme Court decisions which eroded protections Congress intended to provide by enacting civil rights legislation. The expansive definition provided in subsection (b) make Pollard and Heid's conduct strike at the heart of a Section 1981 violation. The fact that Petitioner refused to tolerate being discriminated

against has nothing whatsoever to do with whether at the time Respondents committed their illegal conduct they violated Section 1981 and whether the injury and damages were done prior to action taken by Petitioner. The degree of protection provided under Section 1981 cannot vary depending on whether a potential plaintiff was meek and buckled under or gave into the discrimination or whether a potential plaintiff stood his ground and said "no" to the face of bigotry.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully Submitted,



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APPENDIX A – DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 05-2076

PAULETTE HARRIS
PLAINTIFF-APPELLANT,

v.

CREATIVE HAIRDRESSERS, INC., THE RATNER COMPANIES AND TERESA HEID

DEFENDANTS-APPELLEES

DECIDED: April 27, 2006

Before: Before NIEMEYER and SHEDD, Circuit Judges, and HAMILTON, Senior Circuit Judge

Per Curiam

DECISION

Paulette Harris appeals the district court's order granting summary judgment in favor of Appellee Creative Hairdressers, Inc., d/b/a Hair Cuttery, in her civil action

alleging racial discrimination under *42 U.S.C. § 1981 (2000)* and negligent hiring and retention under Maryland law. We find no reversible error. Accordingly, we affirm for the reasons stated by the district court in its thorough opinion. Se *Harris v. Creative Hairdressers, Inc., 2005 U.S. Dist. LEXIS 19131, No. CA-04-1992-JFM (D. Md. Sept. 2, 2005)*. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PAULETTE HARRIS	*	
	*	
v.	*	Civil No. JFM-04-1992
	*	
CREATIVE	*	
HAIRDRESSERS, INC.	*	

****

ORDER

For the reasons stated in the accompanying memorandum, it is, this 2nd day of September 2005

ORDERED

1. Defendant's motion for summary judgment is granted; and

2. Judgment is entered in favor of defendant against plaintiff.

/s/
J. Frederick Motz
United States District Judge

APPENDIX C – JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 05-2076

PAULETTE HARRIS
PLAINTIFF-APPELLANT,

v.

CREATIVE HAIRDRESSERS, INC., THE RATNER COMPANIES AND TERESA HEID

DEFENDANTS-APPELLEES

Appeal from the United States District Court for the District of Maryland at Baltimore

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will

take effect upon issuance of the mandate.

/s/ Patricia S. Connor
Clerk

APPENDIX D– MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PAULETTE HARRIS	*	
	*	
v.	*	Civil No. JFM-04-1992
	*	
CREATIVE	*	
HAIRDRESSERS, INC.	*	

****

MEMORANDUM

Paulette Harris has brought this action against Creative Hairdressers, Inc., d/b/a Hair Cuttery, asserting a claim for race discrimination under 42 U.S.C. § 1981 and a claim for negligent hiring and retention under Maryland law. Her claims arise out of an incident that occurred when she visited the Governor's Plaza Hair Cuttery in Glen Burnie, Maryland on March 11, 2004[1]. Discovery has been completed, and defendant

[1] Plaintiff worked at Hair Cuttery's Beltway Plaza salon from October 2001 through February 2002. Her employment was terminated for

has filed a motion for summary judgment. The motion will be granted.

I.

On the morning of March 11, 2004, plaintiff entered the Governor's Plaza salon accompanied by her minor daughter[2]. She had previously sought and received service at the salon approximately 50 times without incident. When she entered the salon on March 11th, plaintiff alleges that she approached Theresa Heid, a licensed cosmetologist, whom plaintiff asserts was sweeping the floor at the time. According to plaintiff, Heid asked, "What are you having done today?" Plaintiff responded "shampoo, blow dry."

---

insubordination. She filed an EEOC charge alleging race discrimination as to her discharge. The EEOC issued a no cause finding.

[2] Defendant's witnesses dispute plaintiff's recitation of the facts in many respects. However, Because the evidence must be considered in the light most favorable to the plaintiff in deciding defendant's summary judgment motion I have stated the facts as they are alleged by the plaintiff.

Heid entered plaintiff's name into the salon's computer. Stephanie Pollard, another licensed cosmetologist and the next available stylist, then came over and said, "Are you aware that it is $21.00 for a shampoo and blow dry for you[3]?"Plaintiff responded "No" and went on to say "That ridiculous, most of the time I pay $13.00." According to plaintiff, the following exchange then occurred:

Pollard: "It's because you are ethnic."

---

[3]The provenance of the dispute between plaintiff and Pollard as to the amount that plaintiff was to be charged lies in the surcharges listed in the Salon's price book. While $13.00 is charged for the "shampoo and blow dry service," $21.00 charged for "blow dry straightening." As a former employee of a Hair Cuttery salon, plaintiff was aware of this difference. She also acknowledged that the $21.00 is charged to all customers, regardless of their race, who need the "blow dry straightening" service.

The reason for the $8.00 surcharge is that hair straightening is more labor intensive. Again, plaintiff acknowledges this fact. She asserts, however, that she was wearing her hair straight on March 11th and did not require the straightening service.

Plaintiff: "Is it because I have ethnic hair?"

Pollard: "No, you heard me, it's because you are ethnic."

Plaintiff: "I am not paying $21.00 for something that I normally pay $13.00 for."

Pollard: [After writing $21.00 on a receipt]: This is what you are going to pay or you can get

out."

Plaintiff: "No I am going to call home office."

Pollard wrote down the name of the company headquarters, and plaintiff placed a call to the headquarters on her cell phone. According to plaintiff, during the ensuing conversation a customer service representative, Ruby, apologized to plaintiff, and informed her she could not be told to leave the store. Ruby went on to say that she would immediately call the store and direct that plaintiff receive a shampoo and blow dry service for the $13.00 price requested by plaintiff. Ruby then telephoned Heid on the store phone, and as

a result of the call Heid told plaintiff she would provide the requested service for $13.00.

Plaintiff asserts that Pollard then said to Heid; "make sure you let her know that she's going to have to pay up front because you people got a bad habit of getting services done and not paying them before you leave." Despite this remark, Heid shampooed and blew dry plaintiff's hair without demanding prepayment. However, plaintiff alleges that Heid took another customer before providing service to her. After receiving her treatment, plaintiff paid the $13.00 fee, plus a $5.00 tip to Heid.

Upon leaving the salon, plaintiff immediately called her attorney. She also called back Ruby to complain that she had been asked to pay the $13.00 in advance. Later that day, Gail Logue, defendant's Maryland regional manager, telephoned plaintiff and apologized to her, offering to do whatever was necessary to rectify the situation. Plaintiff, however, refused the offer.

II.

Maryland recognizes that an employer has an obligation to the public to use due care in selecting and retaining only competent and careful employees. *Henley v. Prince George's County*, 479 A.2d 1375, 1382 (Md. 1984), *aff'd in relevant part*, 503 A.2d 1333 (1986).

However, "[t]here is a rebuttable presumption that an employer use[d] due care in hiring an employee." *E.g., Bryant v. Better Bus. Bureau of Greater Maryland*, 923 F. Supp. 720, 751 (D. Md. 1996) (quoting *Evans v. Morsell*, 395 A.2d 480, 483 (Md. 1978)); *see also Horridge v. St. Mary's County Dep't of Social Serv.*, 854 A.2d 1232, 1238 (Md. 2004) (evidence of licenses suggests a minimum of professional competence). To maintain a cause of action for negligent hiring/retention, plaintiff must establish: (1) that the individual was employed by defendant employer, (2) that individual employee was incompetent, (3) defendant employer had actual or constructive knowledge of

that incompetence, (4) an individual employee's act or omission caused the plaintiff's injury, and (5) that defendant employer's negligence in hiring or retaining individual was the proximate cause of the plaintiff's injury. *McGuiness v. Brink's Inc.*, 60 F. Supp. 2d 496, 501 (D. Md. 1999).

In this case it is undisputed that Heid and Pollard, about whose actions plaintiff complains, were employed by defendant. Thus, plaintiff has established the first of these five elements. Her proof, however, is otherwise lacking.

According to plaintiff, Pollard and Heid were "incompetent" because the former used a "racial epithet," attempted to overcharge her because she was black, and suggested that she be required to pay up front, while the latter passed over her to provide service to another customer first. Pollard did not use "a racial epithet." Moreover, although her alleged remarks may be fairly construed as evidencing insensitivity and racial bias, they do not establish her

"incompetence." Likewise, passing over one customer for another (as Heid is alleged to have done) is not proof of incompetence.

In any event, even if Pollard's and Heid's words and actions could be deemed to prove their incompetence, the record is barren of any evidence demonstrating that defendant was aware of any racial prejudice on their part when it hired and retained them in employment. Defendant has presented uncontradicted evidence that all applicants for employment at the Governor's Plaza salon (including Heid and Pollard) were subjected to behavioral interviews (as well as three technical proficiency interviews) before being hired. Further, it is undisputed that all employees at the Governor's Plaza salon are trained on issues of racial sensitivity by videotape training and warning posters in the back of the salon. Moreover, plaintiff has presented no facts evidencing any prior incident of alleged racial discrimination by Heid, Pollard, or anyone else at the

Governor's Plaza salon. Indeed, the record establishes that plaintiff does not even have knowledge of any prior complaint of any act of racial discrimination at the Governor's Plaza salon.[4] Accordingly, plaintiff's claim for negligent hiring/retention fails.

II.

Although most Section 1981 cases involve employment discrimination claims, the statute covers any alleged discrimination in retail or service contracts. Any person within the United States is entitled to "the full and equal benefit of all laws" when making and enforcing contracts in "every State or Territory," which encompasses all aspects of the contract formation and/or termination process. 42 U.S.C. § 1981(a) & (b). To state a cause of action under Section 1981, a plaintiff

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[4]Plaintiff does attach to her opposition materials about alleged acts of racial discrimination at other Hair Cuttery salons at other times. However, these materials prove nothing about Pollard, Heid, or any other employee at the Governor's Plaza salon.

must show: (1) he or she is a member of a racial minority; (2) the defendant intended to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities protected by the statutes. *E.g., Baltimore-Clark v. Kinko's Inc.*, 270 F. Supp. 2d 695, 699 (D. Md. 2003) (citations omitted).

In order to prevail, however, it is necessary that a plaintiff demonstrate that her right to contract has been "impeded, thwarted, or deterred." *Id.* at 699. As stated in *Hampton v. Dillard Department Stores, Inc.*, 247 F.3d 1091, 1118 (10th Cir. 2001), "there must have been interference with the contract beyond the mere expectation of being treated without discrimination while shopping." Otherwise stated, it is not sufficient that a plaintiff merely show that her "enjoyment of the contracting experience" was diminished. *See, e.g., Baltimore-Clark*, 270 F. Supp. 2d at 700. Thus, in *Morris v. Office Max, Inc.*, 89 F.3d 411 (7th Cir. 1996), the court dismissed a Section 1981 claim because the plaintiffs did not

lose a contractual interest despite the regrettable nature of the incident that occurred. In that case, defendant's employees, fearing the possibility of shoplifting from two "suspicious" looking African-American customers, summoned the police to the store who interrogated them. *Id.* at 411-12. The court found the allegations insufficient to establish a Section 1981 claim because the plaintiffs entered the store, browsed, and completed a purchase so they did not lose a contractual interest.

Here, viewing the facts most favorable to plaintiff, her right to contract was not "impeded, thwarted, or deterred." Pollard's alleged comments and her perception that Heid passed over her to provide service to another customer may have "diminished her enjoyment of the contracting experience." However, her characterization of Pollard's remarks as a "racial epithet" is overstated, and those remarks do not bring this case within the line of authority establishing that the very expression of a primitive racial slur can impede the formation of a contract

in violation of Section 1981. *See, e.g., Eddy v. Waffle House, Inc.*, 335 F. Supp. 2d 693, 699-700 (D.S.C. 2004); *Charity v. Denny's, Inc.*, No. 98-0554, 1999 WL 544687, at *4 (E.D. La. July 26, 1999). Similarly, slow service alone does not constitute a violation of Section 1981. *See, e.g., Bobbitt v. Rage Inc.*, 19 F. Supp. 2d 512, 518-20 (W.D.N.C 1998); *Robertson v. Burger King, Inc.*, 848 F. Supp. 78, 80 (E.D. La. 1994).

Finally, although requiring members of one race, but not another, to make upfront payment may violate Section 1981, *see, e.g., Bobbitt,* 19 F. Supp. 2d at 518-20; *cf. Washington v. Duty Free Shoppers, Ltd.*, 710 F. Supp. 1288, 1289-90 (N.D. Cal. 1988), here, it is undisputed that plaintiff was not required to prepay (despite Pollard's alleged contrary suggestion). Thus, the facts that plaintiff did receive a shampoo and blow dry at the $13.00 price she demanded are dispositive and negate her Section 1981 claim.

A separate order granting defendant's summary

judgment motion is being entered herewith.

Date: September 2, 2005 /s/

J. Frederick Motz
United States District Judge

APPENDIX E – DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

PAULETTE HARRIS	*	
	*	
v.	*	Civil No. JFM-04-1992
	*	
CREATIVE	*	
HAIRDRESSERS, INC.	*	

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DECIDED: September 2, 2005

Before: J. Frederick Motz, *United States District Judge.*

MOTZ, *Circuit Judge*

DECISION

Paulette Harris has brought this action against Creative Hairdressers, Inc., d/b/a Hair Cuttery, asserting a claim for race discrimination under *42 U.S.C. § 1981* and a claim for

negligent hiring and retention under Maryland law. Her claims arise out of an incident that occurred when she visited the Governor's Plaza Hair Cuttery in Glen Burnie, Maryland on March 11, 2004. Discovery has been completed, and defendant has filed a motion for summary judgment. The motion will be granted.[5]

On the morning of March 11, 2004, plaintiff entered the Governor's Plaza salon accompanied by her minor daughter. She had previously sought and received service at the salon approximately 50 times without incident. When she entered the salon on March 11th, plaintiff alleges that she approached Theresa Heid, a licensed cosmetologist, whom plaintiff asserts was sweeping the floor at the time. According to plaintiff, Heid asked, "What are you having done today?" Plaintiff responded

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[5]Plaintiff worked at Hair Cuttery's Beltway Plaza salon from October 2001 through February 2002. Her employment was terminated for insubordination. She filed an EEOC charge alleging race discrimination as to her discharge. The EEOC issued a no cause finding.

"shampoo, blow dry."[6]

Heid entered plaintiff's name into the salon's computer. Stephanie Pollard, another licensed cosmetologist and the next available stylist, then came over and said, "Are you aware that it is $ 21.00 for a shampoo and blow dry for you?" Plaintiff responded "No" and went on to say "That ridiculous, most of the time I pay $ 13.00."[7]

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[6] Defendant's witnesses dispute plaintiff's recitation of the facts in many respects. However, because the evidence must be considered in the light most favorable to plaintiff in deciding defendant's summary judgment motion, I have stated the facts as they are alleged by plaintiff.

[7] The provenance of the dispute between plaintiff and Pollard as to the amount that plaintiff was to be charged lies in the surcharges listed in the Salon's price book. While $ 13.00 is charged for the "shampoo and blow dry service," $ 21.00 is charged for "blow dry straightening." As a former employee of a Hair Cuttery salon, plaintiff was aware of this difference. She also acknowledged that the $ 21.00 is charged to all customers, regardless of their race, who need the "blow dry straightening" service.

According to plaintiff, the following exchange then occurred:

Pollard: "It's because you are ethnic."

Plaintiff: "Is it because I have ethnic hair?"

Pollard: "No, you heard me, it's because you are ethnic."

Plaintiff: "I am not paying $ 21.00 for something that I normally pay $ 13.00 for."

Pollard: [After writing $ 21.00 on a receipt]: This is what you are going to pay or you can get out."

Plaintiff: "No I am going to call home office."

Pollard wrote down the name of the company headquarters, and plaintiff placed a call to the headquarters on her cell phone. According to plaintiff, during the ensuing conversation a customer service representative, Ruby,

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The reason for the $ 8.00 surcharge is that hair straightening is more labor intensive. Again, plaintiff acknowledges this fact. She asserts, however, that she was wearing her hair straight on March 11th and did not require the straightening service.

apologized to plaintiff, and informed her she could not be told to leave the store. Ruby went on to say that she would immediately call the store and direct that plaintiff receive a shampoo and blow dry service for the $ 13.00 price requested by plaintiff. Ruby then telephoned Heid on the store phone, and as a result of the call Heid told plaintiff she would provide the requested service for $ 13.00.

Plaintiff asserts that Pollard then said to Heid; "make sure you let her know that she's going to have to pay up front because you people got a bad habit of getting services done and not paying them before you leave." Despite this remark, Heid shampooed and blew dry plaintiff's hair wthout demanding prepayment. However, plaintiff alleges that Heid took another customer before providing service to her. After receiving her treatment, plaintiff paid the $ 13.00 fee, plus a $ 5.00 tip to Heid.

Upon leaving the salon, plaintiff immediately called

her attorney. She also called back Ruby to complain that she had been asked to pay the $ 13.00 in advance. Later that day, Gail Logue, defendant's Maryland regional manager, telephoned plaintiff and apologized to her, offering to do whatever was necessary to rectify the situation. Plaintiff, however, refused the offer.

II.

Maryland recognizes that an employer has an obligation to the public to use due care in selecting and retaining only competent and careful employees. *Henley v. Prince George's County, 60 Md. App. 24, 479 A.2d 1375, 1382 (Md. 1984), aff'd in relevant part, 305 Md. 320, 503 A.2d 1333 (1986).* However, "there is a rebuttable presumption that an employer used due care in hiring an employee." *E.g., Bryant v. Better Bus. Bureau of Greater Maryland, 923 F. Supp. 720, 751 (D. Md. 1996)* (quoting *Evans v. Morsell, 284 Md. 160, 395 A.2d 480, 483 (Md. 1978))*; [*6] *see also Horridge v. St. Mary's County Dep't*

of Social Serv., 854 A.2d 1232, 1238, 382 Md. 170 (Md. 2004) (evidence of lienses suggests a minimum of professional competence). To maintain a cause of action for negligent hiring/retention, plaintiff must establish: (1) that the individual was employed by defendant employer, (2) that individual employee was incompetent, (3) defendant employer had actual or constructive knowledge of that incompetence, (4) an individual emply ec's act or omission caused the plaintiff's injury, and (5) that defendant employer's negligence in hiring or retaining individual was the proximate cause of the plaintiff's injury. *McGuiness v. Brink's Inc., 60 F. Supp. 2d 496, 501 (D. Md. 1999).*

In this case it is undisputed that Heid and Pollard, about whose actions plaintiff complains, were employed by defendant. Thus, plaintiff has established the first of these five elements. Her proof, however, is otherwise lacking.

According to plaintiff, Pollard and Heid were "incompetent"

because the former used a "racial epithet," attempted to overcharge her because she was black, and suggested that she be required to pay up front, while the latter passed over her to provide service to another customer first. Pollard did not use "a racial epithet." Moreover, although her alleged remarks may be fairly construed as evidencing insensitivity and racial bias, they do not establish her "incompetence." Likewise, passing over one customer for another (as Heid is alleged to have done) is not proof of incompetence.

In any event, even if Pollard's and Heid's words and actions could be deemed to prove their incompetence, the record is barren of any evidence demonstrating that defendant was aware of any racial prejudice on their part when it hired and retained them in employment. Defendant has presented uncontradicted evidence that all applicants for employment at the Governor's Plaza salon (including Heid and Pollard) were subjected to behavioral interviews (as well as three technical

proficiency interviews) before being hired. Further, it is undisputed that all employees at the Governor's Plaza salon are trained on issues of racial sensitivity by videotape training and warning posters in the back of the salon. Moreover, plaintiff has presented no facts evidencing any prior incident of alleged racial discrimination by Heid, Pollard, or anyone else at the Governor's Plaza salon. Indeed, the record establishes that plaintiff does not even have knowledge of any prior complaint of any act of racial discrimination at the Governor's Plaza salon. Accordingly, plaintiff's claim for negligent hiring/retention fails.[8]

II. Although most *Section 1981* cases involve employment discrimination claims, the statute covers any

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[8] Plaintiff does attach to her opposition materials about alleged acts of racial discrimination at other Hair Cuttery salons at other times. However, these materials prove nothing about Pollard, Heid, or any other employee at the Governor's Plaza salon.

alleged discrimination in retail or service contracts. Any person within the United States is entitled to "the full and equal benefit of all laws" when making and enforcing contracts in "every State or Territory," which encompasses all aspects of the contract formation and/or termination process. *42 U.S.C. § 1981(a) & (b)*. To state a cause of action under *Section 1981*, a plaintiff must show: (1) he or she is a member of a racial minority; (2) the defendant intended to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities protected by the statutes. *E.g., Baltimore-Clark v. Kinko's Inc., 270 F. Supp. 2d 695, 699 (D. Md. 2003)* (citations omitted).

In order to prevail, however, it is necessary that a plaintiff demonstrate that her right to contract has been "impeded, thwarted, or deterred." *Id. at 699*. As stated in *Hampton v. Dillard Department Stores, Inc., 247 F.3d 1091, 1118 (10th Cir. 2001)*, "there must have been interference with

the contract beyond the mere expectation of being treated without discrimination while shopping." Otherwise stated, it is not sufficient that a plaintiff merely show that her "enjoyment of the contracting experience" was diminished. *See, e.g., Baltimore-Clark, 270 F. Supp. 2d at 700.* Thus, in *Morris v. Office Max, Inc., 89 F.3d 411 (7th Cir. 1996)*, the court dismissed a *Section 1981* claim because the plaintiffs did not lose a contractual interest despite the regrettable nature of the incident that occurred. In that case, defendant's employees, fearing the possibility of shoplifting from two "suspicious" looking African-American customers, summoned the police to the store who interrogated them. *Id. at 411-12.* The court found the allegations insufficient to establish a *Section 1981* claim because the plaintiffs entered the store, browsed, and completed a purchase so they did not lose a contractual interest.

Here, viewing the facts most favorable to plaintiff, her right to contract was not "impeded, thwarted, or deterred."

Pollard's alleged comments and her perception that Heid passed over her to provide service to another customer may have "diminished her enjoyment of the contracting experience." However, her characterization of Pollard's remarks as a "racial epithet" is overstated, and those remarks do not bring this case within the line of authority establishing that the very expression of a primitive racial slur can impede the formation of a contract in violation of *Section 1981. See, e.g., Eddy v. Waffle House, Inc., 335 F. Supp. 2d 693, 699-700 (D.S.C. 2004); Charity v. Denny's, Inc., 1999 U.S. Dist. LEXIS 11462, No. 98-0554, 1999 WL 544687, at *4 (E.D. La. July 26, 1999).* Similarly, slow service alone does not constitute a violation of *Section 1981. See, e.g., Bobbitt v. Rage Inc., 19 F. Supp. 2d 512, 518-20 (W.D.N.C 1998); Robertson v. Burger King, Inc., 848 F. Supp. 78, 80 (E.D. La. 1994).*

Finally, although requiring members of one race, but not another, to make upfront payment may violate *Section 1981*,

see, e.g., Bobbitt, 19 F. Supp. 2d at 518-20; cf. Washington v. Duty Free Shoppers, Ltd., 710 F. Supp. 1288, 1289-90 (N.D. Cal. 1988), here, it is undisputed that plaintiff was not required to prepay (despite Pollard's alleged contrary suggestion). Thus, the facts that plaintiff did receive a shampoo and blow dry at the $ 13.00 price she demanded are dispositive and negate her *Section 1981* claim.

A separate order granting defendant's summary judgment motion is being entered herewith.

Date: September 2, 2005

J. Frederick Motz

United States District Judge

ORDER

For the reasons stated in the accompanying memorandum, it is,

this 2nd day of September 2005

ORDERED

1. Defendant's motion for summary judgment is granted; and

2. Judgment is entered in favor of defendant against plaintiff.

J. Frederick Motz

United States District Judge